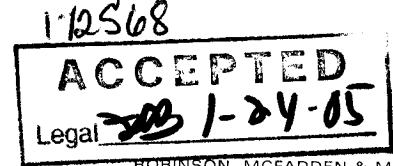




ROBINSON MCFADDEN
ATTORNEYS AND COUNSELORS AT LAW



ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA | GREENVILLE

January 24, 2005

HAND DELIVERED

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Synergy Business Park, Saluda Building
101 Executive Center Drive
Columbia, SC 29210

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**Re: Columbia Energy LLC
Docket No. 2004-267-E
Our File No. 03471-0003**

Dear Mr. Terreni:

Enclosed for filing please find Columbia Energy LLC's Memorandum in Opposition to SCE&G's Motion for Stay in the above referenced case. ***Due to the complicated procedural history of this case, we respectfully request that the Commission consider this motion during the oral arguments requested by SCE&G which the Commission has already agreed to hear on the matter.***

By copy of this letter we are serving a copy of our memorandum on counsel for other parties of record. Please stamp the extra copies provided as proof of filing and return them with our courier. Should you need any additional information, please contact me.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

FRE/bds
Enclosure
cc/enc:

Douglas C. Turner, Esquire
Mitchell Willoughby, Esquire
Paige Gossett, Esquire
Len S. Anthony, Esquire
Kendall Bowman, Esquire
Dan F. Arnett, ORS Chief of Staff

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2004-267-E

In re:

PETITION OF COLUMBIA
ENERGY LLC FOR A
DECLARATORY ORDER
CONCERNING AGREEMENT
WITH SCE&G FOR WAIVER OF
QUALIFYING FACILITY STATUS

COLUMBIA ENERGY LLC'S
MEMORANDUM IN OPPOSITION
TO SCE&G'S MOTION
FOR STAY

South Carolina Electric & Gas Company ("SCE&G") filed a motion for stay of this docket during the pendency of an appeal before the South Carolina Court of Appeals. SCE&G appealed the decision of Honorable Steven H. John issued on October 14, 2004, which held that the Public Service Commission of South Carolina ("Commission") should review the issues relating to the federal Public Utility Regulatory Policies Act of 1978 ("PURPA") under the doctrine of primary jurisdiction. Columbia Energy LLC ("Columbia Energy") submits this memorandum in opposition to SCE&G's motion for stay and requests that the Commission deny the motion. SCE&G has offered this Commission no valid reason why this case should be stayed and has failed to follow procedural rules; therefore, its motion should be denied.

BACKGROUND

In 2000 Columbia Energy sought approval from this Commission to operate a generation facility in Calhoun County, South Carolina ("Calhoun Facility"). SCE&G

intervened in that proceeding. During the proceeding Columbia Energy and SCE&G entered a stipulation entitled "Settlement Agreement" by which SCE&G agreed not to oppose the Calhoun Facility. The Settlement Agreement was not submitted to this Commission for approval.

The Commission eventually issued Order No. 2001-108 in which it authorized Columbia Energy to build and operate the Calhoun Facility. In that proceeding the Commission found that the Calhoun Facility was a Qualifying Facility under the terms of PURPA and the regulations of FERC. In the Settlement Agreement SCE&G obtained from Columbia Energy a waiver of certain rights which Columbia Energy had pursuant to PURPA.

On June 25, 2004, SCE&G filed a declaratory judgment action seeking injunctive relief in the Calhoun County Court of Common Pleas, (*South Carolina Electric & Gas Co. v. Columbia Energy, LLC*, Case No. 04-CP-09-095) in regard to the same Settlement Agreement which is the subject of this petition for a declaratory order. On July 26, 2004, Columbia Energy filed a motion to dismiss the complaint in which it asserted that the issues raised in SCE&G's complaint were subject to the primary jurisdiction of the Commission. On September 10, 2004, Columbia Energy filed a petition for a declaratory order with the Commission concerning the Settlement Agreement.

The hearing on Columbia Energy's motion to dismiss the complaint was held on September 17, 2004, before Judge Steven H. John. The Court issued an Order of Remand and Granting Stay dated October 14, 2004, ("Remand Order") in which the

Court found that pursuant to the doctrine of primary jurisdiction the case should be stayed.

Upon consideration of the factors outlined above, I find and conclude that pursuant to the doctrine of primary jurisdiction the present action should be referred to the Commission and stayed while the Commission considers the issue referred to it by the Court. This Court will retain jurisdiction over this case so that any issues which remain, including the claims, can be addressed in light of rulings by the Commission on matters in this case, if any, within its particular jurisdiction.

Remand Order, p. 6.

On October 20, 2004, SCE&G filed a motion to dismiss Columbia Energy's petition for a declaratory order. Columbia Energy filed a memorandum in opposition to SCE&G's motion to dismiss on November 15, 2004. On November 17, 2004, SCE&G appealed the Remand Order to the Court of Appeals. On December 28, 2004, Columbia Energy filed a motion to dismiss the appeal on the grounds that the Remand Order is an interlocutory order that is not subject to appellate review.

On December 14, 2004, SCE&G filed its motion for stay of the Commission proceeding. The effect of SCE&G's latest tactical maneuver is to ask this Commission to overrule the decision of Judge John who held that the dispute between Columbia Energy and SCE&G, which arose out of a Commission proceeding, should be addressed first by the Commission. By its motion for a stay, SCE&G seeks to prevent the Commission from going forward as Judge John held.

ARGUMENT

Rule 225 of the South Carolina Rules of Appellate Procedure controls with respect to the effect of an appeal on pending actions. This rule provides for an

automatic stay in some specified circumstances. From its motion for a stay, SCE&G apparently concedes that no automatic stay is appropriate in this case. See SCE&G memorandum n. 1, p. 3. Rule 225 also provides broad authority for the Circuit Court or the Court of Appeals to issue the stay which SCE&G seeks in this motion:

Further, where it appears that that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the trial or appellate judge, justice, or appellate court may order other affirmative relief upon such terms as are deemed appropriate.

Rule 225 (c)(3). This rule would allow SCE&G to approach either the Circuit Court or the Court of Appeals to ask for a stay or writ of supersedeas to prevent this Commission from going forward with this case. SCE&G has offered no explanation for its failure to follow the procedure described in the Rules of Appellate Procedure.

Instead, SCE&G relies principally on what it cites as the case of *H.J Heinz v. Milnot Holding Corp.* FTC Docket No. 9295. However, the “holding” cited by SCE&G is no holding at all. The language quoted by SCE&G from *Heinz* is actually taken from a memorandum in support of a party’s motion to stay proceedings from the Federal Trade Commission. The order itself indicates that the motion was not opposed by the other party and does not contain the language quoted by SCE&G. See attached Exhibit 1, *In the Matter of H.J. Heinz Co.*, 2001 FTC Lexis 6.

SCE&G also cites the cases of *Rush v. Thompson* 203 S.C. 106, 26 S.E.2d 411 (1943) and *Talley v. Johns-Manville* 285 S.C. 117, 328 S.E.2d 621 (1985). Neither of these cases supports SCE&G’s motion. In fact, both cases support the Judge John’s order that this Commission should examine this dispute prior to further action in court. In *Rush*, the Supreme Court affirmed a circuit court’s determination as to whether legal or equitable issues should be decided first. This holding is consistent with Judge John’s

ruling on this Commission's proper role under the doctrine of primary jurisdiction. *Talley* presented an extraordinary situation arising in the context of asbestos litigation where the Supreme Court determined that a Circuit Court action should be stayed pending resolution of administrative actions before the Industrial Commission. That decision again supports Judge John's decision which SCE&G is challenging on appeal.

SCE&G is appealing a decision by Judge John which held that pursuant to the doctrine of primary jurisdiction this Commission should take the lead in addressing the dispute between these parties. Judge John's decision was based on his finding that the issues in the case were primarily PURPA issues for which this Commission has jurisdiction and special expertise. SCE&G does not agree with his decision and is appealing it. By this motion to this Commission, SCE&G is attempting to have this Commission overturn the decision of Judge John: if a stay is granted it will be directly in conflict with Judge John's order which was that this Commission should move forward. Under these circumstances, SCE&G should not be able to obtain a stay from the Commission. Rule 225 provides the appropriate mechanism for the relief it seeks. This Commission should deny the motion and proceed with this case until such time as SCE&G obtains a stay or writ of supersedeas from the Circuit Court or the Court of Appeals.

CONCLUSION

SCE&G's motion for stay should be denied since SCE&G is attempting to have the Commission overturn the decision of a Circuit Court Judge. There is an adequate procedure to obtain a stay from the Circuit Court or the Court of Appeals and SCE&G has failed to follow the rules.

Dated this 24th day of January, 2005.

ROBINSON, MCFADDEN & MOORE, P.C.

By: _____



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Attorneys for Columbia Energy LLC

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2004-267-E

In re:

Petition of Columbia Energy, LLC
for a Declaratory Order Concerning
Agreement with SCE&G for Waiver
of Qualifying Facility Status

CERTIFICATE OF SERVICE

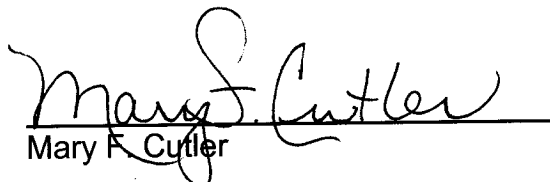
This is to certify that I, Mary F. Cutler, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the persons named below the **Columbia Energy LLC's Memorandum in Opposition to SCE & G's Motion for Stay** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Paige J. Gossett, Esquire
Mitchell Willoughby, Esquire
Willoughby & Hoefer, P.A.
PO Box 8416
Columbia, SC 29202

Charles H. Williams, II, Esquire
Williams & Williams
370 St. Paul Street N.E.
PO Box 1084
Orangeburg, SC 29116

Len S. Anthony, Esquire
Kendal Bowman, Esquire
Progress Energy Service Company, LLC
Post Office Box 1551
Raleigh, NC 27602;

Dated at Columbia, South Carolina this 24th day of January 2005.


Mary F. Cutler